(4)

Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [02/06/91]

CASE NBR: [90100552] CFH STATUS: [ ]
SHORT TITLE: [Diaz-Albertini, Oscar]
VERSUS [United States] DATE DOCKETED: [092790]
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DATE	NOTE	PROCEEDINGS & ORDERS
Sep 27 1990		Petition for writ of certiorari filed.
Oct 25 1990		Order extending time to file response to petition until November 28, 1990.
Nov 28 1990		Order further extending time to file response to petition until December 12, 1990.
Dec 12 1990		DISTRIBUTED. January 4, 1991
Dec 12 1990		Brief of respondent United States in opposition filed.
Jan 7 1991		REDISTRIBUTED. January 11, 1991
Jan 14 1991		REDISTRIBUTED. January 18, 1991
Jan 22 1991		Petition GRANTED. Judgment VACATED and case REMANDED Dissenting opinion by the Chief Justice with whom Justice Scalia and Justice Kennedy join. (Detached opinion.)
		**********

1pp

90-5 52(1)

No.

In the Supreme Court of the United States
OCTOBER TERM, 1990

OSCAR DIAZ-ALBERTINI,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Counsel for the Petitioner

September 20, 1990

QUESTIONS PRESENTED

I

Whether the district court correctly denied the petitioner's motion to vacate his sentence under 28 U.S.C. 2255 on the ground that the petitioner failed to demonstrate cause for his failure to raise his claims on direct appeal of his conviction.

II

Whether the decision of the United States Court of Appeals for the Tenth Circuit in this case is in conflict with the holding of this Court in *Chappell v. United States*, _____ U.S. _____, 110 S.Ct. 1800 (April 16, 1990).

LIST OF PARTIES

The parties to the proceedings below were Mr. Oscar Diaz-Altertini, the petitioner, and the United States, the respondent.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

OSCAR DIAZ-ALBERTINI,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

This case was heard under Title 28, U.S.C. Section 2255, in the United States District Court for the District of New Mexico (D.C. Civil Number 89-0403 HB) and the United States Court of Appeals for the Tenth Circuit (Slip op. 89-2152).

Prior to proceedings under 28 U.S.C. 2255, this case was heard in the United States District Court for the District of New Mexico (D.C. Criminal Number 84-43-1) and the United States Court of Appeals for the Tenth Circuit, *United States v. Diaz-Albertini*, 772 F.2d 654 (l0th Cir. 1985). *Certiorari* was denied in that case by this Court, 108 S.Ct. 82

(1987).

JURISDICTIONAL GROUNDS

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and is sought after the denial of a petition for rehearing, such denial being entered on July 18, 1990, by the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

On April 11, 1984, the petitioner, Oscar Diaz-Albertini, was convicted for a violation of Title 21, U.S.C. Section 841(a)(l). He was sentenced to a term of ten years imprisonment and a special parole term of five years. Mr. Albertini and his wife had been found guilty by a jury after his entry of a plea of not guilty. After the trial, it was determined that one of the jurors had close personal relationships with the law enforcement officers responsible for Mr. Albertini's search and arrest.

Mr. Albertini was represented at trial by William Clay, Esquire. During the proceedings, Mr. Clay was informed that a problem existed regarding one of the jurors in Mr. Albertini's case. Mr. Clay did not act on that information, nor did he make any inquiries at that time into the juror's disqualifying circumstances in order to ensure that Mr. Albertini was tried by an impartial jury. In post-trial proceedings, Mr. Clay testified that due to the pressures of trial he was unable to grasp the significance of the problem with the juror. Mr. Clay testified that he did not even learn of the juror's disqualifying circumstances until after the time to file a motion for a new trial had expired. The District Court held that Mr. and Mrs. Albertini did not receive a trial

by an impartial jury. The Court set aside her conviction on those grounds, but refused to set aside Mr. Albertini's conviction because of the conduct of his attorney.

The United States Court of Appeals for the Tenth Circuit reviewed Mr. Albertini's conviction on direct appeal. Mr. Albertini was represented by Dennis Owens, Esquire, on appeal. *United States v. Diaz-Albertini*, 772 F.2d 654 (10th Cir. 1985). The Tenth Circuit affirmed the conviction, essentially concluding that Mr. Albertini waived his right to an impartial jury because of Mr. Clay's failure to object to the inclusion of the biased juror on the panel. The Tenth Circuit determined that Mr. Clay was aware of the problem with the juror and that he deliberately withheld that information, effectively "sandbagging" the trial court by deciding to raise the issue only after a guilty verdict had been rendered.

After the Tenth Circuit's opinion had been entered in the direct appeal, Mr. Albertini petitioned this Court for its writ of *certiorari*. The Solicitor General filed a brief opposing issuance of the writ. *Certiorari* was denied, 108 S.Ct. 82 (1987).

Upon exhaustion of all avenues of direct appeal, Mr. Albertini filed a motion to vacate his sentence, pursuant to 28 U.S.C. 2255, in the United States District Court for the District of New Mexico. He argued that he had been denied the effective assistance of counsel due to Mr. Clay's failure to raise the juror bias issue during the pendency of the trial. The district court, on July 3, 1989, denied Mr. Albertini's

motion. (This Order is in the Appendix.)

The basis of the district court's decision was that Mr. Albertini's claim of ineffective assistance of counsel was barred due to procedural default, thus barring him from raising the issue through a subsequent motion to vacate sentence under 28 U.S.C. 2255. The procedural default was the failure to raise the effective assistance of counsel issue on direct appeal.

Mr. Albertini appealled the district court's decision to the United States Court of Appeals for the Tenth Circuit, which affirmed the decision. (The Opinion of the Tenth Circuit is in the Appendix.) Mr. Albertini then filed a petition for rehearing.

Subsequently, the decision of this Court in *Chappell v. United States*, ___ U.S. ___, 110 S.Ct. 1800 (1990), was brought to the attention of the Tenth Circuit, together with the unpublished decision below of the Seventh Circuit and copies of the Brief of the United States in Opposition to the grant of the writ of *certiorari* in that case.

Two of the three members of the hearing panel concluded that the original disposition of the case by the Tenth Circuit was correct. Rehearing was denied. The third member of the panel, Judge McKay, indicated that he would grant rehearing "because he believes the case to be controlled by *Chappell v. United States*, ___ U.S. ___, 110 S.Ct. 1800 (1990)." (This Order is in the Appendix.)

REASONS FOR GRANTING THE WRIT

Mr. Albertini's petition for *certiorari* should be granted, the judgment vacated, and his case remanded to the United States Court of Appeals for the Tenth Circuit, because the decision of the court of appeals is clearly not in accord with this Court's ruling in *Chappell v. United States*, ___ U.S ___, 110 S.Ct. 1800 (1990). The question presented in this case is identical to the issue raised in *Chappell*, whether the petitioner is procedurally barred from raising the issue of ineffective assistance of counsel in a collateral attack on his conviction under 28 U.S.C. 2255, if that argument was not raised on direct appeal.

The Tenth Circuit's decision places Mr. Albertini in a untenable procedural position which has severely prejudiced him. There is no dispute that he did not have an impartial jury at trial. This fact is central. The record is undisputed as to the inclusion of a juror whom the district court found to be biased. The Fourth Circuit has noted that "[n]othing is more fundamental to the provision of a fair trial than the right to an impartial jury." *Miller v. North Carolina*, 583 F.2d 701, 706 (4th Cir. 1978). Another circuit has held that the bias of a mere one juror is significant because if one juror was prejudiced, the defendant is denied his constitutional right to an impartial jury. *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979).

Mr. Albertini raised the juror bias issue on direct appeal of his conviction. *United States v. Diaz-Albertini*, 772 F.2d 654 (10th Cir. 1985), cert. denied, 108 S.Ct 82 (1987).

However, the United States Court of Appeals for the Tenth Circuit concluded that he was procedurally barred from obtaining relief on the basis of the juror bias issue because his trial counsel failed to object to the inclusion of the biased juror during the trial. The Tenth Circuit determined that Mr. Clay had known of the biased juror, but that he deliberately chose not to raise the issue until after the trial had been concluded. On this basis of his attorney's misconduct, review of the merits of Mr. Albertini's claim was precluded.

In light of the Tenth Circuit's conclusion as to Mr. Clay's conduct, Mr. Albertini proceeded with his motion to vacate his sentence pursuant to 28 U.S.C. 2255, arguing that he had been denied the effective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution.

Mr. Albertini sought relief under the standard delineated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984): that the test for judging whether counsel rendered constitutionally ineffective assistance is whether counsel's conduct so undermined the proper functioning of the adversarial process that a trial can not be relied on as having produced a just result." *Id*, at 104 S.Ct. 2064. Mr. Clay's conduct resulted in Mr. Albertini being tried by a biased jury. When taken in the context of the holdings of *Miller v. North Carolina, supra*, and *United States v. Eubanks, supra*, it is evident that Mr. Albertini had a credible claim which should have been reviewed on its merits.

This particular result runs afoul of this Court's recent decision in *Chappell v. United States*, ____U.S____, 110 S.Ct. 1800 (1990). The issue presented in *Chappell* is identical to the one in Mr. Albertini's case: whether or not a showing of cause for failure to raise the issue of effective assistance of counsel on direct appeal is required of petitioners who make that claim in collateral attacks on their convictions.

In *Chappell*, this Court granted *certiorari*, vacated the judgment and remanded the case to the United States Court of Appeals for the Seventh Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States, filed February 27, 1990. Id. The United States' position basically concurred with Mr. Albertini's position in this case that claims of ineffective assistance of counsel ordinarily should be raised in the first instance in a motion under 28 U.S.C. 2255, rather than on direct appeal (Brief For The United States in Opposition, pp. 7, 8, *Chappell v. United States, supra*).

The United States has long contended that claims of ineffective counsel should be raised in the first instance in a motion under Section 2255, rather than on direct appeal. This was the position of the Solicitor General in *United States v. Cronic*, 466 U.S. 648 (see U.S. Brief at 40-41 and U.S. Reply Brief at 20).

The circuits are not in conflict with this view, with few exceptions. *United States v. Costa*, 890 F.2d 480, 482-483 (lst Cir. 1989); *United States v. Cruz*, 785 F.2d 399, 404 (2d

Cir. 1986); *United States v. Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States v. Sandini*. 888 F.2d 300, 311-312 (3d Cir. 1989); *United States v. Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); *United States v. Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 459 U.S. 843 91982); *United States v. Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), cert. denied, 109 S.Ct.2447 (1989); *United States v. Myers*, 892 F.2d 642, 648-649 (7th Cir. 1990); *United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989); *United States v. Casamayor*, 837 F.2d 1509, 1516 (llth Cir. 1988), cert. denied, 109 S.Ct. 813 (1989). In the District of Columbia Circuit, if a claim of ineffective assistance of trial counsel is raised on direct appeal, that court ordinarily will remand the case to the district court for resolution of the claim before disposing of the direct appeal--or, if the defendant has also filed a Section 2255 motion raising an ineffectiveness claim, the court will stay proceedings on the direct appeal pending resolution of the Section 2255 motion. *United States v. Cyrus* 890 F.2d 1245, 1247 (1989).

Clearly, the Supreme Court rejected the approach of the Tenth Circuit in this case when it remanded the *Chappell* case.

Furthermore, Mr. Albertini should not be required to make a showing of cause as to why he did not raise the ineffective assistance of counsel argument on direct appeal. Such a requirement is unreasonable. The *Chappell* decision implicitly adopted the position of the United States as articulated by the Solicitor General. He conceded in his *Chappell* brief that failure to pursue ineffective assistance of

counsel claims on direct appeal would not constitute a procedural default. Thus, the need for a showing of "cause" would be dispensed with.

CONCLUSION

The Court should issue its writ of *certiorari* to the Tenth Circuit and remand this case with directions that it further consider the matter in light of *Chappell v. United States* and the position of the Solicitor General in that controversy.

Mr. Albertini should be allowed to raise the very real issue of the effectiveness of his trial counsel. By granting *certiorari* in this case, the Court will make that possible for the first time.

Respectfully submitted,
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APPENDIX

(Filed May 2, 1990)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

89-2152

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
OSCAR DIAZ-ALBERTINI,
Defendant-Appellant.

Appeal From the United States District Court
for the District of New Mexico
(D.C. Criminal No. 89-403HB)

ORDER AND JUDGMENT

Before McKAY, BARRETT, Circuit Judges,
and KANE,* District Judge.

This is an appeal from the denial of appellant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 because of alleged ineffective assistance of counsel. The United States District Court for the District of New Mexico, after *de novo*

* Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

review, adopted the findings of the United States Magistrate which found that appellant's claim was procedurally barred.

Appellant was convicted under 21 U.S.C. § 841(a)(l) of possession of cocaine with intent to distribute. Before trial, appellant's counsel was made aware that a potentially biased juror had been selected for appellant's panel. Appellant's counsel did not bring this matter to the attention of the trial judge until well after trial. After being apprised of the problem, the trial court held several post-trial hearings and concluded "that counsel made a conscious decision to postpone raising the matter until after a conviction resulted." *United States v. Diaz-Albertini*, 772 F.2d 654, 656 (10th Cir. 1985), *cert. denied*, 484 U.S. 822 (1987). On direct appeal, this court held that when the facts supporting a claim of juror bias are known prior to trial, the issue cannot be deferred and raised for the first time after trial. *Id.* at 657. Such conduct constituted a waiver of appellant's right to attack the composition of the jury, *id*, and was a procedural default barring this court from considering appellant's juror bias claim on direct appeal.

The district court viewed appellant's section 2255 claim as an attempt to relitigate the juror bias issue. In order for this court to consider appellant's juror bias claim on collateral review, appellant must comply with the requirements set out by the Supreme Court in *United States v. Frady*, 456 U.S. 152, 168 (1982): "[t]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual preju-

dice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167-68 (1982). The district court found that, while the section 2255 claim was styled as an independent claim of ineffective assistance of counsel, it was more properly an attempt to satisfy the cause requirement necessary under *Frady* to remedy the prior procedural default which had barred this court from hearing the claim of juror bias on direct appeal.[1] The district court dismissed appellant's section 2255 claim based on his failure to raise the ineffective assistance issue on direct appeal, and on his failure to demonstrate cause. We affirm.[2]

On direct appeal we found the conduct on the part of appellant's trial counsel to be a conscious choice in the nature of a tactical decision, *Diaz-Albertini*, 772 F.2d at 657, and we agree with the district court that such strategic trial decisions, and even errors due to counsel's inadvertence or ignorance, will not serve as causes to excuse procedural default. *See Reed v. Ross*, 468 U.S. 1, 14-15 (1984); *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986). This conclusion, however, is qualified by the assumption that counsel was competent: "Underlying the concept of cause, however, is at

[1] A proper showing of ineffective assistance of counsel will satisfy the showing of cause required to excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[2] While both parties in their briefs identify the proper standard of review here as the clearly erroneous standard, we think otherwise. The clearly erroneous standard is appropriate when we review factual findings of a district court acting pursuant to 28 U.S.C. § 2255. *United States v. Owens*, 882 F.2d 1493, 1501 n.16 (10th Cir. 1989). Here, however, the district court did not conduct a hearing, holding instead that appellant's claim was barred because of appellant's procedural default. A finding of procedural default is a conclusion of law. Conclusions of law are reviewable *de novo*. *Bill's Coal Co. v. Board of Public Utilities*, 887 F.2d 242, 244 (10th Cir. 1989).

least the . . . notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of *competent* counsel. . . ." *Reed v. Ross*, 468 U.S. at 13, (emphasis added). "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668, 690 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Murray v. Carrier*, 477 U.S. at 488. Furthermore, in justifying its decision to hold a claimant barred by procedural default to a showing of both cause *and* prejudice before such default will be excused, the Supreme Court has cited the right to effective assistance of counsel as "an additional safeguard against miscarriages of justice in criminal cases." *Id* at 496. "The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices [caused by imposing the cause and prejudice requirement]." *Id.* Counsel's tactical choice at trial to forego objecting to the allegedly biased juror will fail to serve as cause for the procedural default only if appellant's trial counsel was competent.

The government argues that appellant's case is one of double procedural default: the first procedural default being appellant's failure to raise the juror bias issue at trial, and the second procedural default being appellant's failure to raise his ineffectiveness claim on direct appeal. This second failure, the government contends, bars appellant from raising his ineffectiveness claim in a collateral proceeding absent a showing of cause and prejudice. "We agree that the failure

to raise a constitutional claim at trial or on direct appeal generally will prohibit federal collateral review of that claim absent cause and prejudice." *Osborn v. Shillinger*, 861 F.2d 612, 622 (l0th Cir. 1988) (citing *Murray v. Carrier*, 477 U.S. 478 (1986)).[3] However, as we have held in *Osborn*, a claim of ineffective assistance of counsel may be brought for the first time collaterally without a showing of cause and prejudice. *Id.* (citing *Kimmelman v. Morrison*, 477 U.S. 365 (1986)). In *Osborn*, we allowed the petitioner to resurrect his ineffectiveness claim, noting that "*[w]here . . . an ineffectiveness claim cannot be made on the basis of the record and the allegedly ineffective counsel handled both the trial level proceedings and the direct appeal*, a petitioner may raise an ineffective assistance of counsel claim for the first time collaterally." *Osborn*, 861 F.2d at 623 (emphasis added).

Applying the factors identified in *Osborn*, which condition the hearing of defaulted ineffective assistance claims, we find that appellant's claim cannot meet those conditions. Appellant argues that he was unable to bring the ineffectiveness claim until after this court ruled on his direct appeal because it was not until after that ruling that he knew whether his trial counsel had actually been ineffective. We are unpersuaded by this argument. The appellant here had all the information available to him necessary to frame a claim for ineffective assistance of counsel. He had the record from the post-trial hearings on the matter, which

[3] We note that appellant was convicted in federal court for violation of a federal law. A federal rather than a state procedural rule was broken here. Nevertheless, "the federal interest in finality is as great as the State's, and the relevant federal constitutional strictures apply with equal force to both jurisdictions." *Frady*, 456 U.S. at 169 n.17 (1982).

included testimony both by the public defender who had alerted appellant's trial counsel to the problem and by trial counsel himself. Given this record, we believe that appellant could have brought the ineffective assistance claim on direct appeal and should have done so.

In addition we note that counsel on direct appeal was not the same attorney who represented appellant at trial. We are therefore not presented with the dilemma identified by the Seventh Circuit in *Bush v. United States*, 765 F.2d 683 (7th Cir.), *cert. denied*, 474 U.S. 1012 (1985), in which the court held that representation on direct appeal by the same allegedly ineffective trial counsel did not provide the petitioner with a fair opportunity to raise the ineffective assistance claim in a timely manner. *Id.* at 684.

Because appellant here does not qualify for the exception noted in *Osborn* which would allow an ineffective assistance claim to be raised for the first time collaterally, appellant must show cause and prejudice for his failure to argue ineffective assistance of counsel on direct appeal. Appellant has pointed to no cause and has identified no prejudice flowing from this failure. He is, therefore, barred from raising the claim in this collateral proceeding.

The judgment of the United States District Court for the District of New Mexico is hereby AFFIRMED.

ENTERED FOR THE COURT
PRE CURIAM

No. 89-2152, *United States v. Diaz-Albertini*

McKAY, Circuit Judge, concurring in the result:

I concur in the result in this case because I do not believe that, as framed, the appellant has stated a claim of ineffective assistance of counsel sufficient to meet the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). I do not, however, believe that the appellant has waived his right to raise the ineffective assistance of counsel claim in this collateral proceeding.

ORDER - July 18, 1990

Before McKAY, BARRETT, Circuit Judges, and KANE,* District Judge.

No. 89-2152

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
OSCAR DIAZ-ALBERTINI,
Defendant-Appellant.

This matter is before the court on appellant's petition for rehearing.

The materials submitted by appellant have been reviewed by the members of the hearing panel, the majority of whom conclude that the original disposition was correct. Accordingly, the petition is denied on the merits. Judge McKay would grant the petition because he believes the case to be controlled by *Chappell v. United States* ____ U.S. ____, 110 S. Ct. 1800 (1990).

Entered for the Court

ROBERT L. HOECKER, Clerk

*Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

Criminal Case No. 84-43
Civil No. 89-0403 HB
Filed July 3, 1989

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
v.
OSCAR DIAZ-ALBERTINI,
Defendant-Movant.

ORDER

THIS MATTER having come before the Court on the proposed findings and recommended disposition of the United States Magistrate, and objections to the proposed findings and recommended disposition having been filed, and the Court having made a **de novo** determination of those portions of the Magistrate's proposed findings and recommended disposition objected to;

IT IS HEREBY ORDERED that the proposed findings and recommended disposition of the United States Magistrate are adopted by the Court,

IT IS FURTHER ORDERED that the Motion be, and it hereby is, denied.

HOWARD C. BRATTON
United States District Judge

Criminal Case No. 84-43-01
Civil No. 89-0403 HB
Filed May 24, 1989

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
v.
OSCAR DIAZ-ALBERTINI,
Defendant-Movant.

MAGISTRATE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Proposed Findings

1. This is a proceeding on a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255. Movant attacks the judgment and sentence entered in *United States v. Diaz-Albertini*, No. CR 84-43-01 (D.N.M.), *aff'd.*, 772 F.2d 654 (l0th Cir. 1985), *cert. denied*, _ U.S. _, 108 S.Ct. 82 (1987).

2. Movant asserts a single ground for relief: denial of his Sixth Amendment right to effective assistance of counsel. Movant's claim is based on trial counsel's failure to timely raise a claim of juror bias. The facts underlying Movant's juror bias claim are set forth in detail in the Court

of Appeals' decision affirming Movant's conviction. 772 F.2d at 655-57.

3. Where a claim is not presented in a procedurally correct manner at trial, a §2255 movant must demonstrate both cause and actual prejudice in order to obtain collateral relief. *United States v. Frady*, 456 U.S. 152, 167 (1982); *United States v. Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988). Thus, although Movant presents his ineffective assistance of counsel claim as an independent claim [1], Movant's claim is more properly analyzed as bearing upon the issue of whether there exists "cause" sufficient to excuse Movant's failure to present his juror bias claim in a procedurally correct manner.

4. Both the trial court and the Court of Appeals concluded that Movant's trial counsel deliberately and knowingly withheld Movant's claim of juror bias. This type of conduct by defense counsel cannot satisfy the cause prong of the cause and prejudice test. See *Reed v. Ross*, 468 U.S. 1, 14 (1984).

5. Additionally, this Court notes that Movant's ineffective-assistance-of-counsel claim is itself subject to the cause and prejudice test. On direct appeal, Movant's appellate counsel did not raise the claim that Movant's trial counsel was ineffective in his handling of the juror bias issue,

[1]This Court agrees with Respondent that Movant's ineffective assistance of counsel claim is a transparent attempt to relitigate Movant's underlying juror bias claim, which was rejected on procedural grounds by the Court of Appeals on direct appeal.

although the factual basis of Movant's current ineffective assistance of counsel claim clearly was available to appellate counsel. Thus, Movant's case presents what the Seventh Circuit Court of Appeals has termed a "'double procedural default' situation." *Carter v. Nix*. 803 F.2d 296, 299 (7th Cir. 1986). Movant's first default occurred when trial counsel withheld the juror bias issue. Movant's second default occurred when appellate counsel failed to raise on direct appeal the issue of trial counsel's ineffectiveness in handling the juror bias issue. Either default, if not excused by cause and prejudice,.is sufficient to preclude §2255 relief.

6. Movant's lead counsel in this §2255 proceeding is the same attorney who represented Movant on direct appeal. His withholding on direct appeal of Movant's ineffectiveness of trial counsel claim suggests to this Court exactly the same "tactical decision to forego a procedural opportunity," 468 U.S. at 14, that the Supreme Court denounced in *Reed*. As in the case of trial counsel, see discussion *supra* ¶4, this apparently deliberate withholding of a claim cannot qualify as cause for Movant's procedural default. *Reed*, 468 U.S. at 14. See also *Smith v. Murray*, 477 U.S. 527, 534 (1986).

7. In view of Movant's procedural defaults at trial and on appeal, and Movant's failure to demonstrate cause, his claim is subject to dismissal with prejudice.

Recommended Disposition

That the motion be denied.

Sumner G. Buell
UNITED STATES MAGISTRATE

(2)

No. 90-552

In the Supreme Court of the United States

OCTOBER TERM, 1990

OSCAR DIAZ-ALBERTINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the courts below correctly denied petitioner's motion to vacate his sentence under 28 U.S.C. 2255 on the ground that he did not demonstrate cause for his failure to raise his claim on direct appeal of his conviction.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-552

OSCAR DIAZ-ALBERTINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A7) is not reported. The prior opinion of the court of appeals affirming petitioner's conviction on direct appeal is reported at 772 F.2d 654.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1990, and a petition for rehearing was denied on July 18, 1990. Pet. App. A8. The petition for a writ of certiorari was filed on September 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment. The court of appeals affirmed. *United States* v. *Diaz-Albertini*, 772 F.2d 654 (10th Cir. 1985), cert. denied, 484 U.S. 822 (1987). In 1989, petitioner moved under 28 U.S.C. 2255 to vacate his sentence on the ground that he had been denied effective assistance of counsel. The district court denied relief, Pet. App. A9-A12, and the court of appeals affirmed, *id.* at A1-A8.

1. The evidence at petitioner's trial, the sufficiency of which is not disputed, showed that petitioner and his wife were driving a station wagon in which cocaine was concealed inside a compartment in the tailgate of the car. The cocaine was discovered after petitioner's car was stopped at a highway roadblock and petitioner consented to a search of the car. 772 F.2d at 655.

2. On the first day of the trial, the court conducted *voir dire* both for that trial and for an unrelated case. During the first *voir dire*, which was for petitioner's trial, the court asked whether any member of the venire was closely associated with someone involved in law enforcement. Paul Chavez, a member of the venire who was ultimately chosen as a juror for petitioner's trial, remained silent in response to that and other questions. After the *voir dire* was completed, petitioner's attorney and his wife's attorney left the courtroom. 772 F.2d at 655.

During *voir dire* for the second trial, Chavez stated in response to a similar question that he had a "close acquaintanceship with the State Police." 84-1818 Gov't C.A. Br. 9.[1] After the second *voir dire* was completed, defense counsel in the second case—the federal public defender—talked to petitioner's counsel outside the courtroom and told him that one of the jurors on the panel for petitioner's case (Chavez) had stated during *voir dire* that he was acquainted with state police officers. Petitioner's counsel testified at a subsequent hearing on the issue that he decided at the time of that conversation to examine the transcript of the second *voir dire* "should we have a conviction." 772 F.2d at 656.

After petitioner was convicted, he moved for a new trial, raising for the first time the question of Chavez's bias. *Ibid.* The district court held an evidentiary hearing on the issue. That hearing established that Chavez was the godfather of one of the children of the state police officer who supervised the roadblock and whose name was mentioned several times during the trial.[2] The hearing also established that, due to the small size of the town in which the roadblock took place, Chavez was acquainted with [redacted] involved in the roadblock, the search, and the arrest. After hearing testimony from petitioner's counsel and the public defender who spoke with petitioner's counsel after the second *voir dire*,[3] the district court held that defense counsel had

[1] "84-1818 Gov't C.A. Br." refers to the government's brief in the Tenth Circuit on the direct appeal of petitioner's conviction.

[2] The officer testified at the suppression hearing, although not at petitioner's trial. 772 F.2d at 656.

[3] The public defender did not recall precisely what she said to petitioner's counsel after the second *voir dire*. She testified that she might have done nothing more than tell him that Chavez had a close acquaintance with the state police in the town, or she might have suggested that petitioner's counsel

notice of the possible problem concerning Chavez before the jury was sworn, and that by failing to raise the claim until after trial, petitioner, through counsel, had knowingly and purposefully waived his right to object to Chavez's presence on the jury. The court therefore denied petitioner's motion for a new trial. It granted the similar motion filed by petitioner's wife, however, because there was no evidence that her attorney had knowledge before trial of the conversation regarding Chavez. 772 F.2d at 656.

3. On direct appeal of his conviction, petitioner, represented by new counsel, acknowledged that a defendant may be held to have waived a claim concerning the composition of the jury if the defendant or defense counsel had knowledge of the basis for such a claim and did not object in a timely manner. 84-1818 Appellant's C.A. Br. 15-17 (citing, *inter alia*, *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 550 n.2 (1984)). Petitioner also asserted (84-1818 Appellant's C.A. Br. 17-18) that "there is no question that an attorney of even minimal competence (far less than that which Mr. Clay, [petitioner's] trial counsel, exhibited at trial) would have challenged Chavez for cause had he known of Chavez's relationship with the police officers." Petitioner argued (84-1818 Appellant's C.A. Br. 11-12, 18-23; Reply Br. 4), however, that there was no such waiver here because his trial counsel was preoccupied with preparing his opening statement when he had

do something about the matter or that he might want to get Chavez off the jury. 772 F.2d at 656. Chavez also testified at the hearing. In response to a question by petitioner's counsel whether his relationship with the state police officers would cause any problems about his attitude or state of mind as a juror, he stated: "that wouldn't have bothered me at all." 84-1818 Gov't C.A. Br. 16.

the conversation with the public defender and did not become fully aware of the basis for a bias claim concerning Chavez until after trial.

The court of appeals rejected that argument. It affirmed the district court's factual finding that the public defender told petitioner's attorney that Chavez had stated during the second *voir dire* that he was closely acquainted with state police officers, and it held that, under *McDonough Power Equipment, Inc.* v. *Greenwood*, *supra*, petitioner had waived his right to object to the composition of the jury by not raising the claim in a timely manner. 772 F.2d at 657.[4]

4. a. Petitioner then filed a motion under 28 U.S.C. 2255, represented by the same attorney who represented him on direct appeal. In his Section 2255 motion, petitioner again raised the issue of Chavez's possible bias, this time arguing that his trial counsel had rendered ineffective assistance by waiting to raise the claim until after trial. The district court denied relief. Pet. App. A9-A12. It concluded that the Section 2255 motion was a "transparent attempt to relitigate [petitioner's] underlying juror bias claim, which was rejected on procedural grounds by the Court of Appeals on direct appeal." *Id.* at A11 n.1. The court noted that petitioner was barred from raising the juror-bias claim itself on collateral attack, because his trial counsel's deliberate tactical decision to wait until after trial to raise it failed to satisfy the "cause" prong of the "cause and prejudice" test for obtaining relief on collateral attack on a claim that was not raised at trial. *Id.* at A11 (citing *Reed* v. *Ross*, 468 U.S. 1, 14 (1984), and *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982)).

[4] The court also upheld the validity of the stop and the search of petitioner's automobile. 772 F.2d at 657-659.

The district court held that petitioner's claim of ineffective assistance of trial counsel also was subject to the cause and prejudice test, and that petitioner was barred from raising that claim on collateral attack because he did not raise it on direct appeal of his conviction. Pet. App. A11-A12. The court noted that petitioner is represented in these proceedings under Section 2255 by the same lawyer who represented him on direct appeal, and that "[h]is withholding on direct appeal of [petitioner's] ineffectiveness of trial counsel claim suggests * * * [a] 'tactical decision to forego a procedural opportunity.'" *Id.* at A12 (quoting *Reed* v. *Ross*, 468 U.S. at 14). "As in the case of trial counsel," the district court concluded, "this apparently deliberate withholding of a claim cannot qualify as cause for [petitioner's] procedural default" in failing to raise the ineffective assistance of trial counsel claim on direct appeal. Pet. App. A12.

b. In an unpublished opinion the court of appeals affirmed the district court's denial of relief under 28 U.S.C. 2255, holding that petitioner is procedurally barred from raising his claim of ineffective assistance of trial counsel on collateral attack. Pet. App. A1-A6. The court of appeals reasoned that, in the circumstances of this case, the claim of ineffective assistance of trial counsel should have been raised on direct appeal, because petitioner was represented by new counsel on direct appeal and because appellate counsel had "all the information available to him [that was] necessary to frame a claim for ineffective assistance of counsel"—namely, "the record from the post-trial hearings on the [juror-bias] matter, which included testimony both by the public defender who had alerted [petitioner's] trial counsel to the problem and by trial counsel himself." *Id.* at A5-A6.

Because petitioner had not shown "cause" for his failure to raise the issue on direct appeal in these circumstances, the court held that he is barred from raising it under Section 2255. Pet. App. A6.

Judge McKay concurred in the result. Pet. App. A7. He did not believe that petitioner had waived his ineffective assistance of trial counsel claim, but he would have rejected that claim on the merits under the standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984).

c. Petitioner filed a petition for panel rehearing. On rehearing, petitioner brought to the panel's attention this Court's disposition of the certiorari petition in *Chappell* v. *United States*, 110 S. Ct. 1800 (1990), along with a copy of the government's response to the certiorari petition in that case. In *Chappell*, the Seventh Circuit held that the petitioner was barred, under the "cause and prejudice" test, from raising a claim of ineffective assistance of trial counsel in a motion under Section 2255 because he had been represented by new counsel on direct appeal and therefore could have raised the claim on direct appeal. In response to the certiorari petition in *Chappell*, we informed the Court that it is the position of the United States that claims of ineffective assistance of trial counsel ordinarily should be raised for the first time on collateral attack under Section 2255 rather than on direct appeal. See 89-1040 Br. in Op. 7. We also took the position in *Chappell* that where claims of ineffective assistance of trial counsel are to be raised under Section 2255, a failure to raise such a claim on direct appeal would not constitute a procedural default, and the defendant therefore would not have to establish "cause" for that failure in order to present the claim on collateral

attack. 89-1040 Br. in Opp. 7-8.[5] The Court granted the certiorari petition in *Chappell*, vacated the judgment of the Seventh Circuit, and remanded to that court for further consideration in light of the position taken by the United States in its brief in opposition. 110 S. Ct. 1800.[6]

In this case, without requesting a response from the United States to petitioner's rehearing petition or to his reliance on *Chappell*, the Tenth Circuit panel denied rehearing. Pet. App. A8. Judge McKay stated that he would have granted the petition because he believed the case to be controlled by *Chappell*. Pet. App. A8.

ARGUMENT

Petitioner contends (Pet. 5-9) that, as it did in *Chappell* v. *United States*, 110 S. Ct. 1800 (1990), the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration in light of the position taken

[5] Although we took the position in *Chappell* that claims of ineffective assistance of trial counsel should ordinarily be raised in a motion under 28 U.S.C. 2255, we urged the Court to deny the petition in *Chappell*. While the Seventh Circuit's aproach departed from the general rule in other courts of appeals, the differing methods for considering claims of ineffective assistance of trial counsel did not, in our view, warrant review by this Court, and the petitioner's ineffective assistance claim in *Chappell* itself had in any event been rejected by the district court on the merits in a ruling on a subsequent motion under Section 2255. 89-1040 Br. in Opp. 4-5, 10-12.

[6] We have been informed by the office of the clerk of the Seventh Circuit that *Chappell* is still pending before the panel following the remand from this Court.

by the Solicitor General in *Chappell*. This case differs from *Chappell*, however. Here, a hearing was held in the district court, in connection with petitioner's motion for a new trial, on the circumstances surrounding the actions of trial counsel that form the basis for petitioner's ineffective assistance of counsel claim, and the record therefore would have enabled petitioner's new counsel to raise the issue on direct appeal. We therefore suggest that the Court deny the petition in this case.

1. Section 2255 is limited to constitutional and jurisdictional claims and to those trial errors that result in a miscarriage of justice. See *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). Section 2255 is not a substitute for a direct appeal. 442 U.S. at 184; *United States* v. *Frady*, 456 U.S. 152, 165 (1982). Accordingly, if a defendant did not raise a claim at trial or on direct appeal, he cannot prevail under Section 2255 unless he shows "cause" for the procedural default at both the trial and appellate levels and substantial prejudice resulting from the error. See *Smith* v. *Murray*, 477 U.S. 527, 533 (1986); *Murray* v. *Carrier*, 477 U.S. 478, 485-486 (1986); *United States* v. *Frady*, 456 U.S. at 167-169; see also *Dugger* v. *Adams*, 489 U.S. 401, 406, 408-410 (1989); *Teague* v. *Lane*, 489 U.S. 288, 297-299 (1989) (plurality opinion).[7]

[7] To demonstrate cause, a defendant ordinarily must show that his default was due to a factor external to the defense, such as the novelty of the claim or interference by the authorities. But if defense counsel's failure to object at trial or to raise an argument on appeal amounted to ineffective assistance of counsel under Sixth Amendment standards, that ineffectiveness constitutes "cause" that excuses a procedural default. *Murray* v. *Carrier*, 477 U.S. at 488.

It has been the government's position for some time that claims of ineffective assistance of trial counsel ordinarily should be raised in the first instance in a motion under Section 2255 rather than on direct appeal. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984). There are two reasons for this position: (1) if the same lawyer represented the defendant both at trial and on appeal, it is unrealistic to expect the lawyer to argue on appeal that his own performance at trial was ineffective; and (2) resolution of claims of ineffective assistance of trial counsel often requires consideration of matters that are outside the record on direct appeal and that should be considered by the district court in the first instance. If a claim of ineffective assistance of trial counsel is supposed to be raised on collateral attack under Section 2255, a failure to raise such a claim on direct appeal would not constitute a procedural default. In that event, the defendant need not establish "cause" for that failure in order to present a claim of ineffective assistance of trial counsel in a motion under 28 U.S.C. 2255.

As we pointed out in our brief in opposition (at 8-9) in *Chappell*, most of the courts of appeals have either required or expressed a strong preference that a claim of ineffective assistance of trial counsel be presented to the district court in the first instance, in a motion under Section 2255.[a] As we also pointed out in our brief in opposition (at 10-11) in *Chappell*, however, it would not be unfair for the courts of appeals to require a defendant who is represented by new counsel on appeal to raise any claim of ineffective assistance of trial counsel on direct appeal, and

[a] Petitioner lists (Pet. 7-8) the cases we cited in our brief in opposition in *Chappell*.

for the courts to apply the cause and prejudice test if the defendant does not do so. The courts of appeals would then have the option of either addressing the ineffectiveness issue in the proceedings on direct appeal (with a remand to the district court for the receipt of evidence and factual findings, if necessary) or declining to resolve the issue on direct appeal and remitting the defendant to a motion under Section 2255. Nonetheless, in light of the general position of the United States—and of the courts of appeals—that claims of ineffective assistance of trial counsel should ordinarily be raised in a motion under Section 2255, the Court granted the certiorari petition in *Chappell*, vacated the Seventh Circuit's judgment in that case, and remanded for further consideration in light of the position taken in our brief in opposition. To this extent, the Court's disposition in *Chappell* might suggest a similar disposition here.

2. This case, however, differs from *Chappell* in one important respect. In this case, the district court held a hearing on petitioner's motion for a new trial, which raised the juror-bias issue. Although the hearing did not address the matter specifically in terms of whether trial counsel rendered ineffective assistance under Sixth Amendment standards, it did elicit testimony concerning the circumstances in which trial counsel first learned of the possible juror bias and his explanation for why he did not raise the issue until after petitioner was convicted. The transcript of that hearing—as well as the district court's finding that trial counsel had made a deliberate tactical choice to withhold the juror-bias issue until after trial, and its order granting a new trial to petitioner's wife on the basis of the same claim—were fully available to

petitioner's new counsel on direct appeal. That record would have furnished a basis for counsel to argue that trial counsel had been constitutionally ineffective in not raising the issue prior to trial.

In fact, as we have pointed out (see page 4, *supra*), appellate counsel *did* argue in his brief (at 17-18) on direct appeal that "an attorney of even minimal competence * * * would have challenged Chavez for cause had he known of Chavez's relationship with the police officers," but further argued that trial counsel was not sufficiently aware of that relationship to require him to challenge Chavez before the jury was sworn. Appellate counsel easily could have argued, in the alternative, that if the court of appeals concluded that trial counsel was on notice of the basis for a bias claim concerning Chavez but deliberately chose not to raise it prior to trial, then trial counsel's failure to do so constituted ineffective assistance of counsel. But appellate counsel did not make that argument. To the contrary, he argued (84-1818 Appellant's C.A. Br. 18) that the level of "minimal competence" to which he referred was "far less than that which Mr. Clay, [petitioner's] trial counsel, exhibited at trial." Thus, there is considerable force to the district court's view (Pet. App. A12) that the withholding of an ineffective assistance of counsel claim on direct appeal reflected a deliberate tactical decision by petitioner's new attorney.

Since the district court held a hearing on petitioner's motion for a new trial concerning the circumstances of the underlying juror-bias claim on which petitioner now relies in advancing his ineffective assistance of counsel claim, this case somewhat resembles *United States* v. *Cronic*. There, the Court observed that whatever the soundness as a general matter of the government's position that claims of ineffective assistance of trial counsel should be raised under 28 U.S.C. 2255 rather than on direct appeal, the claim in *Cronic* itself was properly considered by the Tenth Circuit on direct appeal because the defendant had raised it in a motion for a new trial in the district court. 466 U.S. at 667 n.42. The only difference here is that petitioner did not frame the juror-bias issue as a claim of ineffective assistance of counsel, either in the district court or the court of appeals, even though the hearing on his new trial motion fully explored the reasons for trial counsel's decision.

Because the record that was developed in the district court apparently would have been adequate for the court of appeals to address the ineffective assistance of trial counsel claim if petitioner had raised it on direct appeal, and because there was no impediment to petitioner's doing so (since he was represented by new counsel on appeal), the holding by the court below that petitioner is barred from raising his Sixth Amendment claim on collateral attack in the particular circumstances of this case is neither unreasonable nor unfair. The fact that the district court held a hearing on the circumstances surrounding trial counsel's decision also distinguishes this case from *Chappell*.

There is, of course, much to be said for a clear and uniform rule in this area, so that appellate counsel, the government, and the courts will not have to speculate about whether an ineffective assistance claim is properly presented on direct appeal and will not have to draw uncertain lines in proceedings under 28 U.S.C. 2255 in deciding whether the claim *should* have been presented on direct appeal. The general

rule we proposed in *Cronic* and *Chappell*—that claims of ineffective assistance of trial counsel should be raised for the first time in the district court in a motion under Section 2255—serves that purpose.[9] For this reason, we believe on balance that although a defendant in petitioner's position might be fully able as a practical matter to raise his ineffective assistance of trial counsel claim on direct appeal, the preferable result from the perspective of the federal criminal justice system as a whole is that he should not be *required* to do so—and that he therefore need not show cause for failing to do so in order to raise the claim in a motion under Section 2255. However, because we rest that conclusion on the net benefits that would accrue to the criminal justice system as a whole (not on a view that the somewhat different approach taken by the Tenth Circuit was unfair to petitioner) —and because the Tenth Circuit recognized that the cause and prejudice standard need not be satisfied where the defendant did not have a realistic opportunity to raise the ineffective assistance of counsel claim on direct appeal—we do not believe that certiorari is warranted in this case.

At all events, as we stated in our brief in opposition (at 11-12) in *Chappell*, we do not believe that the issue of the appropriate procedures for raising claims of ineffective assistance of trial counsel warrants plenary review at this time. That is especially so in this case, which raises the issue in the unique

[9] Of course, even under this rule, where the ineffective assistance of counsel claim *was* raised, as such, in the trial court in a motion for a new trial, as in *Cronic*, the defendant must preserve that issue on direct appeal. If he does not do so, he must show "cause" in order to resurrect the issue on collateral attack.

context of the district court's having held a hearing on the circumstances surrounding the attorney conduct that now forms the basis for the ineffective assistance of counsel claim. Accordingly, if the Court believes that the ruling below warrants further consideration, we agree with petitioner (Pet. 5, 9) that the appropriate course would be to return the case to the Tenth Circuit for that purpose. The panel below did not request a response by the United States to petitioner's petition for rehearing or his reliance on *Chappell*, and it therefore did not have the benefit of the views of the United States, presented herein, concerning the effect of the disposition of *Chappell* on this case.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the views expressed herein.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OSCAR DIAZ-ALBERTINI *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90–552. Decided January 22, 1991

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of the position presently asserted by the Solicitor General in his brief for the United States filed December 12, 1990 and asserted in his brief for the United States filed February 27, 1990, in No. 89–1040, *Chappell* v. *United states*.

THE CHIEF JUSTICE, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

The Court vacates the judgment of the Court of Appeals for the Tenth Circuit and remands for "further consideration in light of the position presently asserted by the Solicitor General in his brief for the United States filed December 12, 1990 and asserted in his brief for the United States filed February 27, 1990, in No. 89–1040, *Chappell* v. *United States*." The Solicitor General, however, has taken the position that the judgment and reasoning of the Court of Appeals were correct and that certiorari should be denied. The Court's disposition fails to provide the Court of Appeals with any useful guidance on remand, leaving that court with the task of spending scarce judicial resources trying to divine what we mean. I therefore dissent.

Petitioner filed a motion under 28 U. S. C. § 2255 seeking to vacate a sentence previously imposed on the ground that he had been denied effective assistance of counsel by his trial counsel's failure to raise a juror-bias claim until after the trial.

The Court of Appeals affirmed the District Court's denial of relief holding that petitioner was procedurally barred from raising his claim of ineffective assistance of trial counsel on collateral attack. App. to Pet. for Cert. A1–A6. The court reasoned that the claim should have been raised on direct appeal because petitioner was represented by new counsel on direct appeal and because appellate counsel had "all the information available to him necessary to frame a claim of ineffective assistance of counsel." *Id.*, at A5. Because petitioner had not shown "cause" for his failure to raise the issue on direct appeal, the court concluded that he was barred from raising it under § 2255.

Petitioner then filed a petition for rehearing, arguing that the panel should reconsider its decision in light of this Court's disposition of the certiorari petition in *Chappell* v. *United States*, 494 U. S. —— (1990). In *Chappell*, the United States Court of Appeals for the Seventh Circuit had held that the defendant was barred from raising a claim of ineffective assistance of trial counsel in a § 2255 motion because he had been represented by new counsel on direct appeal and therefore could have raised the claim at that time. *Chappell* v. *United States*, 878 F. 2d 384 (1989) (judgment order). In response to the petition for certiorari, the Solicitor General submitted a brief on behalf of the United States which stated that it was the position of the United States that claims of ineffective assistance of counsel ordinarily should be raised for the first time on collateral attack under § 2255 rather than on direct appeal. The Solicitor General further stated that where claims of ineffective assistance of trial counsel are to be raised in a § 2255 motion, a failure to raise such a claim should not constitute procedural default. The Court granted the petition for certiorari in *Chappell*, vacated the judgment of the Court of Appeals, and remanded to that court for further consideration in light of the position taken by the United States in its brief. 494 U. S. —— (1990).

In this case, the Court of Appeals denied the petition for rehearing without requesting a response from the United States. Petitioner then filed a petition for certiorari, arguing that we should grant the petition, vacate the judgment of the Tenth Circuit, and remand for further consideration in light of the position taken by the United States in *Chappell*. However, in its brief for the United States in opposition, the Solicitor General recommended that the Court *deny* the petition. The Solicitor General asserted that this case was distinguishable from *Chappell* because "[h]ere, a hearing was held in the district court, in connection with petitioner's motion for a new trial, on the circumstances surrounding the actions of trial counsel that form the basis for petitioner's ineffective assistance of counsel claim, and the record therefore would have enabled petitioner's new counsel to raise the issue on direct appeal." Brief in Opposition 9. The Solicitor General concluded that "[b]ecause the record that was developed in the district court apparently would have been adequate for the court of appeals to address the ineffective assistance of trial counsel claim if petitioner had raised it on direct appeal, and because there was no impediment to petitioner's doing so (since he was represented by new counsel on appeal), the holding by the court below that petitioner is barred from raising his Sixth Amendment claim on collateral attack in the particular circumstances of this case is neither unreasonable nor unfair." *Id.*, at 13.

I have previously questioned the wisdom of automatically vacating a Court of Appeals judgment favorable to the Government when the Solicitor General confesses error in this Court, See *Mariscal* v. *United States*, 449 U. S. 405, 406 (1981) (REHNQUIST, J., dissenting), or of vacating a Court of Appeals' judgment in favor of the Government when the Solicitor General concedes that the analysis of the Court of Appeals may have been wrong but considers the result correct. See *Alvarado* v. *United States*, 497 U. S. ——, —— (1990) (REHNQUIST, C. J., dissenting). Today the Court carries

these unfortunate practices to new lengths: the Solicitor General has neither confessed error nor questioned the reasoning of the court below, but instead has taken the position that the reasoning and judgment of the Court of Appeals were correct and that certiorari should be denied.

I am at a loss to understand what purpose is served by the Court's decision today. If the Court means what it says, it will have wasted the time of the litigants in the Court of Appeals; the Solicitor General takes the position that this case is distinguishable from *Chappell* and that the judgment of the Court of Appeals was therefore correct. If the Court means something else, it should say so expressly, rather than leaving it to judges who are just as busy as we are to do what can best be described as read tea leaves.